PUBLIC PROSECUTOR

v.

FRANCIS DANG NUYA

HIGH COURT, BRUNEI
MACDOUGALL J
[CRIMINAL TRIAL NO. 6 OF 1987]
20 MAY 1987

CRIMINAL PROCEDURE: *Plead guilty to lesser offence - Whether an amended charge to be filed - Sections 158 and 170 Criminal Procedure Code [Brunei] - The words "shall be punished with imprisonment for life" under s. 304 Penal Code [Brunei] - Whether mandatory - Section 39 Interpretation & General Clauses Act (Cap. 4).*

The accused was charged for murder and at the trial he intended to plead guilty to the lesser offence of culpable homicide not amounting to murder. The questions to be determined by the Courts are:

(a) whether an amended charge should be filed;

(b) whether it is mandatory to pass a sentence of life imprisonment as punishment for an offence under the first limb of s. 304 of the Penal Code of Brunei.

Held:

[1] In such a case, the correct procedure is for the charge of murder to be read to the accused for plea. If he wishes to plead guilty to the lesser offence, it is open to him to plead not guilty to murder but guilty to culpable homicide not amounting to murder. The agreed facts should then be read to the accused. If he confirms that they are correct, it is then open to the prosecution to state whether it accepts that plea.

[2] The mandatory force of the words "shall be punished with" under s. 304 of the Penal Code makes it clear that the penalty stated therein is mandatory.

[3] The accused was accordingly sentenced to life imprisonment.

Case referred to:
PP v. Lee Ah Sam [1949] 15 MLJ 236

Legislation referred to:
Criminal Procedure Code [Brunei], ss. 158, 170
Emergency Regulation 1948, reg. 5(1)
Penal Code [Ind], s. 304
Interpretation and General Clauses Act (Cap 4) [Brunei], ss. 2(1), 39
Interpretation and General Clauses Ordinance 1948, s. 51
Penal Code [Brunei], ss. 292, 304
Societies Act (Cap 66) [Brunei], s. 16

For the state - Ivan Leong DPP
For the accused - Dalit S. Sandhu; M/s. Sandhu & Co.

JUDGMENT

Macdougall J:

Ruling 1

At the beginning of this trial, the Deputy Public Prosecutor, Mr. Ivan Leong, having indicated that the accused intended to plead guilty to the lesser offence of culpable homicide not amounting to murder, sought my guidance as to whether the prosecution should file an amended charge.

According to Mr. Leong, where the charge is one of murder and the accused has offered to plead guilty to the lesser offence, it has hitherto been the practice for the prosecution, if it is prepared to accept such a plea, to file an amended charge so as to substitute the charge of murder with one of culpable homicide not amounting to murder punishable under s. 304 of the Penal Code (Cap. 22).

The authority that Mr. Leong relied upon in justification of this procedure is s. 158 of the Criminal Procedure Code (Cap. 7) which reads as follows:

> (1) Any Court may alter or add to any charge at any time before judgment is pronounced or, in the case of trials with the aid of assessors, before the opinions of the assessors are expressed.
>
> (2) Every such alteration or addition shall be read and explained to the accused.

This section does not confer on the prosecution a right to alter or add to a charge without the leave of the Court. It is plain that the power to alter or amend resides in the Court not the prosecution and that if the prosecution seeks to alter or amend or charge, it must make application to the Court for leave to do so.

In my view, however, in a case such as the present one, the correct procedure is for the charge of murder to be read to the accused for plea. If he wishes to plead guilty to the lesser offence, it is open to him to plead not guilty to murder but guilty to culpable homicide not amounting to murder. The agreed facts should then be read to the accused. If he confirms that they are correct, it is then open to the prosecution to state whether it accepts that plea.

The greater offence of murder necessarily includes the lesser offence of culpable homicide not amounting to murder. Indeed, in a contested murder trial, it is possible that the accused may not be found guilty of murder but of the lesser offence.

Section 170 of the Criminal Procedure Code provides:

> (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it.
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.
>
> (3) Nothing in this section shall be deemed to authorise a conviction of any offence referred to in subsection (1) of s. 132 of this Code when no complaint has been made as required by that subsection.

If the practice has been to substitute a charge of culpable homicide not amounting to murder for one of murder where the prosecution is prepared to accept a plea from the accused to the lesser offence, then it is wrong and should cease. The correct procedure is that which I have already outlined.

Ruling 2

The accused having pleaded guilty to the lesser offence of culpable homicide not amounting to murder and having confirmed the facts as read out by the prosecutor, which included the fact that he had intended to kill the deceased, the prosecution and the Court accepted his plea.

It is not disputed that the punishment for which the accused thus becomes liable is that referred to in the first limb of s. 304 of the Penal Code. The section reads:

> Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to 10 years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

Mr. Sandhu submitted on behalf of the accused that the words "shall be punished with imprisonment for life" are not mandatory but that the Court has a discretion to impose such sentence of imprisonment that it thinks fit up to a maximum of life imprisonment.

In support of his contention he relied on two principal arguments. First, he referred to the corresponding section of the Indian Penal Code, which is also s. 304. It reads as follows:

> Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine or with both, if the act is done with the knowledge that it is likely to cause death or to cause such bodily injury as is likely to cause death.

Mr. Sandhu sought to persuade me that since there have been numerous instances of sentences less than life imprisonment having been imposed under the first limb of that section, it follows that it is not mandatory to pass a sentence of life imprisonment as punishment for an offence under the first limb of s. 304 of the Penal Code of Burnei.

There is, however, a vital distinction between the two sections. Whilst it is mandatory under the first limb of each section to impose a sentence of imprisonment, the Indian section invests the Court with a discretion to pass either a life sentence or one not exceeding ten years. The Brunei section does not confer this discretion on the Court. The only sentence expressed to be applicable to an offence under the first limb is one of life imprisonment.

Moreover, the words "shall be punished with" are used, not the words "may be punished with" or the words "shall be liable to". The mandatory force of the words "shall be punished with" is reinforced by the use in the second limb of the section of the words "which may extend to 10 years". These latter words clearly confer a discretion on the Court to impose such sentence not exceeding ten years as it thinks fit. If therefore the legislature had intended that in cases falling within the first limb of the section the length of imprisonment should be left to the discretion of the Court, it would undoubtedly have used similar words to those found in the second limb, and not the mandatory words "shall be punished with".

Accordingly I do not think that there is any substance in the first argument advanced by Mr. Sandhu.

His second argument was that if the words "shall be punished with" in the first limb of s. 304 are mandatory, their plain effect is overridden by s. 39 of the Interpretation and General Clauses Act (Cap. 4.) The section reads:

> Whenever, in or by virtue of any written law, a penalty, whether of imprisonment or fine, is prescribed for an offence the same shall imply:
>
> (a) that such offence shall be punishable upon conviction by a penalty not exceeding the penalty prescribed; and
>
> (b) if the amount of the fine is unspecified, that such offence shall, without prejudice to any provision of law against excessive and unreasonable fines and assessments, be punishable by a fine of any amount,

In further support of this argument, Mr. Sandhu cited the case of *Public Prosecutor v. Lee Ah Sam* [1949] 15 MLJ 236. This concerned an offence against reg. 5(1) of the Emergency Regulations 1948 of which the relevant part then read:

> shall be liable to be punished with death, or with penal servitude for life and whipping.

Section 51 of the Interpretation and General Clauses Ordinance 1948 (Malayan Union Ordinance No. 7 of 1948) which the Court found to be applicable to the Regulations, was as follows:

> Whenever in any written law a penalty as provided for an offence against such law, such provision shall indicate that such offence shall be punishable, upon conviction, by penalty not exceeding (except as may be otherwise expressly mentioned in such law) the penalty provided.

The Court held that, by virtue of this section where by any provision of law a penalty is prescribed, unless there is some express provision in that law itself stating otherwise, the penalty prescribed is the maximum.

It is clear that the wording of the regulation is materially different from that of s. 304 of the Penal Code. The words "shall be liable to", which appear in the regulation, do not appear in s. 304 of the Penal Code. They lack the mandatory force of the words 'shall be punished with".

Section 39 of the Interpretation and General Clauses Act and s. 51 of the corresponding Malaysian legislation were enacted, as were similar sections in other parts of the Commonwealth, to remove any doubt that might otherwise exist that unless mandatory words are used in a penal provision the offence to which it relates is punishable by a penalty not exceeding the penalty prescribed.

Mr. Sandhu then pointed out that words similar to "except as may be otherwise expressly mentioned in such law", as appear in s. 51 of the Malaysian legislation, do not appear in s. 39 of the Brunei Act. This, however, overlooks the existence of s. 2(1) of that Act which provides:

> Save where the contrary intention appears, the provisions of this Act shall apply to this Act and to any written law now or hereafter in force made by competent authority in Brunei, and to any instrument made or issued thereunder.

In my view, a contrary intention plainly appears from the wording of s. 304 of the Penal Code. Section 39 is designed to apply to penalty provisions where no indication is given that the legislature intended that there be a specific mandatory penalty.

An example of such a provision is s. 292 of the Penal Code which concludes with these words:

> Penalty, a fine of not less than RM500 and not more than RM5,000 and/or imprisonment for 12 months, and in the case of a second or subsequent conviction, a fine of not less than RM1,000 and not more than RM30,000 and/or imprisonment for 3 years.

Section 39 thus makes it clear that the two terms of imprisonment there referred to may not exceed 12 months in the fist case and three years in the second.

Another example is s. 16 of the Societies Act (Cap. 66) which provides for a penalty of imprisonment for three years. These are but two of many examples that could be cited of sections which do not stipulate that the penalties stated therein are mandatory. In each case, s. 39 makes it plain that these penalties are but the maximum terms of imprisonment that a Court may impose for the offences to which they relate.

It is to sections such as the examples I have given that s. 39 applies. Where, however, as in the case of s. 304 of the Penal Code, a contrary intention appears, s. 39 has no application.

Accordingly I am of the view that the second argument advanced by Mr. Sandhu must also fail and that I am obliged by s. 304 to sentence the accused to life imprisonment.

Also found at [1988] 2 CLJ 130